STATE OF MICHIGAN

COURT OF APPEALS

DOROTHY J. ADAMS,

Plaintiff-Appellant,

v

NATIONAL CHURCH RESIDENCES, INC.,

Defendant-Appellee.

UNPUBLISHED
December 11, 2003

No. 242107
Wayne Circuit Court
LC No. 01-122091-NO

Before: Cavanagh, P.J., and Jansen and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals by leave granted[1] an order granting defendant summary disposition pursuant to MCR 2.116(C)(10) in this premises liability case. We affirm.

A trial court's decision on a motion for summary disposition is reviewed de novo on appeal. *Dressel v Ameribank*, 468 Mich 557, 516; 664 NW2d 151 (2003). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests whether there is sufficient factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition pursuant to MCR 2.116(C)(10) may be granted when the moving party is entitled to judgment as a matter of law, or the affidavits or other proofs show that there is no genuine issue of material fact. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998).

To establish that a cause of action exists for negligence a plaintiff must demonstrate:

> [T]he defendant owed a legal duty to the plaintiff, that the defendant breached or violated the legal duty, that the plaintiff suffered damages, and that the breach was a proximate cause of the damages suffered. [*Richardson v Michigan Humane Society*, 221 Mich App 526, 528; 561 NW2d 873 (1997).]

[1]Plaintiff originally filed a claim of appeal with this Court; however, this Court concluded that the claim of appeal was not timely filed. In lieu of dismissing plaintiff's appeal, this Court treated the claim as a delayed application for leave to appeal and granted the delayed application.

To determine the existence of a duty, a court will analyze the relationship of the parties and the nature and foreseeability of the risk. *Schultz v Consumers Power Co*, 443 Mich 445, 450; 506 NW2d 175 (1993). The duty owed to an invitee has been defined as follows:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the conditions, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger. [*Riddle v McLouth Steel Products Corp*, 440 Mich 85, 93; 485 NW2d 676 (1992), quoting 2 Restatement Torts, 2d § 343.]

The duty of a possessor of land to an invitee is to exercise reasonable care to protect the invitee from an unreasonable risk of harm due to a dangerous condition existing on the premises. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). However, this duty does not typically include the removal of dangers that are open and obvious. Specifically, in *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001), our Supreme Court provided that:

> [A] premises possessor is not required to protect an invitee from open and obvious dangers, but, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk.

The determination of whether a condition or hazard is open and obvious is based on the following simple, common sense analysis:

> "Would an average user with ordinary intelligence have been able to discover the danger and the risk presented upon casual inspection? That is, is it reasonable to expect that the invitee would discover the danger? With respect to an inclined handicap access ramp, we conclude that it is." [*Arias v Talon Development Group, Inc*, 239 Mich App 265, 268; 608 NW2d 484 (2000) quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993).]

In a negligence action, the first question that must be resolved is what, if any, duty of care is owed. The trial court decides this as a matter of law. *Riddle, supra* at 95, citing *Antcliff v State Employees Credit Union*, 414 Mich 624, 640; 327 NW2d 814 (1982). Further, *Riddle, supra* at 95-96 also provided:

> [T]he 'no duty to warn of open and obvious danger' rule is a defensive doctrine that attacks the duty element that a plaintiff must establish in a prima facie negligence case. A negligence action may only be maintained if a legal duty exists which requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm.

Plaintiff incorrectly contends the trial court improperly engaged in fact finding regarding the open and obvious nature of the premises condition, at issue, in this case. As noted above, it is a court's responsibility to answer the threshold question regarding the existence of a duty. *Riddle, supra at* 95. This is not merely the determination of the existence or level of relationship between the parties. The determination must include, as a matter of law, whether reasonable minds could differ that the condition of the premises was open and obvious in order for any duty to arise. *Glittenberg v Doughboy Recreational Ind (On Rehearing)*, 441 Mich 379, 398-399; 491 NW2d 208 (1992). In this instance, the photographs presented by both parties are clear and unmistakable. The condition of the premises is open and obvious. This, when combined with the fact it was a sunny and clear day, plaintiff's vision was not obstructed and plaintiff was very familiar with the building entrance, confirms the hazard was discoverable by plaintiff on casual visual inspection.

Having determined the first question regarding the open and obvious nature of the premises condition, the court must make a second determination to ascertain the existence of a legal duty between the parties. In making this determination our Supreme Court has stated:

> [T]he critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly 'special aspects' of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e., whether the 'special aspect' of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability. [*Lugo, supra* at 517-518.]

It should be noted that:

> [O]nly those special aspects that give risk to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine. [*Id.* at 519.]

Plaintiff incorrectly suggests that the fact that the property involved is a residence for senior citizens by itself, or in combination with the existence of caution tape in an adjacent area to the location where plaintiff fell, created a special condition that presented an unreasonable risk of harm. Plaintiff asserts that by barricading one area it was reasonable to assume that any unmarked areas were safe and made the area where plaintiff fell unavoidable.

As both plaintiff and defendant rely upon the same case, it will be instructive to analyze the circumstances encountered by this plaintiff to the factual situation and law applied in *Lugo, supra.* The *Lugo* plaintiff stepped into a pothole while walking from a parking lot into a building, resulting in a fall. In this case, plaintiff testified she fell because it "just felt like my toe hooked up on something and I tripped." Based on the photographs submitted into evidence and the location of plaintiff's fall, the area contains what the trial court characterized as "crumbled concrete." Both plaintiffs indicate they were not watching the ground while walking but that nothing was obstructing their vision or prevented them from observing the premises condition. *Id.* at 514-515.

When evaluating the risk of harm:

> [I]t is important to maintain the proper perspective, which is to consider the risk posed by the condition *a priori*, that is, before the incident involved in a particular case. It would . . . be inappropriate to conclude in a retrospective fashion that merely because a particular plaintiff, in fact, suffered harm or even severe harm, that the condition at issue in a case posed a uniquely high risk of severe harm. This is because a plaintiff may suffer a more or less severe injury because of idiosyncratic reasons . . . that are immaterial to whether an open and obvious danger is nevertheless unreasonably dangerous . . . . [T]his opinion does not allow the imposition of liability merely because a particular open and obvious condition has some potential for severe harm. [*Lugo, supra* at 518-519.]

Specifically recognizing the ordinary and everyday parking lot pothole as an open and obvious danger, the *Lugo* Court noted that special aspects, which may give rise to liability for a premises possessor, do not occur from such conditions. *Id.* at 520. The common pothole does not present an unusually high potential for injury and, therefore, it cannot serve as the basis to impose liability upon a premises possessor. *Id.* By analogy, a section of crumbled sidewalk concrete is sufficiently similar in its nature to a pothole to also be considered an open and obvious condition that does not present an unreasonable risk of harm. As stated in *Lugo, supra:*

> Indeed an 'ordinarily prudent person' . . . would typically be able to see the pothole and avoid it. Further, there is little risk of severe harm. Unlike falling an extended distance, it cannot be expected that a typical person tripping on a pothole and falling to the ground would suffer severe injury. [*Id.,* citing *Bertrand, supra* at 615.]

Plaintiff alleges the presence of caution tape in an area created an unreasonable risk of harm by delimiting plaintiff's access to the building's entryway. This is an overly expansive interpretation of case law. It is recognized that a situation may arise where an open and obvious condition is unavoidable and liability may be imposed because of the unreasonable danger or risk of severe harm that may occur. *Lugo, supra* at 518. However, the facts of this case do not require application of this exception. Plaintiff's own diagrams of the premises establish there are considerable choices available to plaintiff for entry into the building. Plaintiff is not restricted to one narrow path that mandates her to traverse the area including the defective concrete to enter her residence. As such, the condition is not unavoidable and a special aspect permitting the imposition of liability does not arise.

Plaintiff also asserts the fact that plaintiff fell outside a senior citizen residence is a special aspect that creates an unreasonable risk of harm. Plaintiff is in error, as a "special aspect" refers only to the characteristics of the hazard or condition itself. *Lugo, supra* at 517. The fact the condition exists outside a senior citizen residence is immaterial.

Finally, plaintiff contends the trial court improperly engaged in fact finding by determining that plaintiff was contributorily negligent. Plaintiff specifically relies upon the following statement by the trial court that:

> [T]he evidence would indicate that it was a sunny day. There was no ice. There's no claim that there was ice; that she was not looking where she was walking; that

> it was crumbled concrete. There is no difference in the elevation of the sidewalk planks.

Plaintiff is correct that a determination of comparative negligence would be a fact question for resolution by a jury. However, it was not necessary for the trial court to proceed that far in its analysis. Our Supreme Court in *Lugo, supra* at 522, determined that:

> The level of care used by a particular plaintiff is irrelevant to whether the condition created or allowed to continue by a premises possessor is unreasonably dangerous. . . . Rather, the important point is that the plaintiff . . . offered nothing to distinguish the [pothole] at issue from ordinary [potholes] in terms of the danger that they presented.

The relevant case law is not interpreted as barring a plaintiff's claim because of the lack of exercise of appropriate care for his or her own safety. *Id.*, citing *Bertrand, supra* at 621. Rather, it is the failure to establish anything unusual about the open and obvious premises condition that precludes liability. In deciding motions for summary disposition in cases that involve open and obvious conditions the courts must "focus on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff." *Id.* at 524.

Plaintiff failed to present to the trial court evidence of any special aspects that would have transformed the open and obvious condition of the premises into a situation that involved an unreasonable danger necessitating the imposition of liability.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Peter D. O'Connell